



BEFORE THE ENERGY RESOURCES CONSERVATION AND DEVELOPMENT
COMMISSION OF THE STATE OF CALIFORNIA
1516 NINTH STREET, SACRAMENTO, CA 95814
1-800-822-6228 – WWW.ENERGY.CA.GOV

APPLICATION FOR CERTIFICATION FOR THE
CARLSBAD ENERGY CENTER PROJECT

DOCKET No. 07-AFC-06

ERRATA TO REVISED PRESIDING MEMBER'S PROPOSED DECISION

The Carlsbad AFC Committee recommends the following additional revisions¹ to the March 28, 2012, Revised Presiding Member's Proposed Decision (RPMPD):

INTRODUCTION

1. Introduction, p. 1-1, third paragraph, revise as follows:

We find significant unmitigated land use impacts and that the CECP does not comply with certain City of Carlsbad development laws and standards, **a single provision of the State Fire Code and may not be consistent with the Coastal Act.** Nonetheless, we find that the benefits of the project outweigh those impacts **and inconsistencies** and approve the project.

AIR QUALITY

2. Air Quality, p. 6.2-26, further revise the entire Prevention of Significant Deterioration Permit subsection beyond the revised language provided in the RPMPD Revisions, as follows:²

9. Prevention of Significant Deterioration (PSD) Permit

Although the issue is yet unsettled, and there is no final determination of applicability, it is possible if not likely that CECP will require a PSD permit for GHG emissions to satisfy new federal requirements for such. (12/12/11 RT. p. 190.) The PSD is a "preconstruction permit," in that a project may not be constructed until the permit is obtained and becomes final. (40 C.F.R. § 52.21(b)(43)[2011].) The San Diego Air Pollution Control District (APCD), the agency that would normally issue any permit

¹ Where text is modified, changes are shown in **bold underline**/~~strikeout~~ (**new text**/~~deleted text~~).

² The new changes recommended by this Errata are at the end of the Section. We reprint the entire subsection for the reader's convenience, with the previously recommended changes incorporated and no longer marked as such.

absent Energy Commission's preemptive statute, has not adopted requirements for its State Implementation Plan regarding federal PSD provisions. Because it has not done so, federal requirements are implemented through a separate federal permit, issued by the U.S. Environmental Protection Agency (EPA). For CECP, EPA Region 9 would grant the federal permit unless such authority is delegated to the APCD; either way, the permit remains a separate federal permit. (40 C.F.R. § 124.41 [2011]; Greater Detroit Res. Recovery Authority v. U.S.E.P.A. (6th Cir. 1990) 916 F.2d 317, 320-321 ["Permits issued under such a delegation are considered to be EPA-issued permits."])

When EPA or its delegate issues such permits, the permit applicant must satisfy purely federal requirements, and state law requirements are excluded from any consideration in the permit or in the appeal of such permits. (See, e.g., *In re West Suburban Recycling and Energy Center, L.P.* (6 E.A.D. 692, 698 (EAB 1996); *In re Sutter Power Plant* (8 E.A.D. 680, 690 (EAB 1999); *In re Tondo Energy Co.* (9 E.A.D. 710, 717 (EAB 2001)).³

Thus, if CECP must obtain a PSD permit, it is a federal permit issued by EPA, cannot address state law issues, and is appealable solely at EAB and subsequently the federal Ninth Circuit Court of Appeals. It follows that the Commission has no purview over this federal permit, nor does it enforce the provisions that it implements.⁴

Power plant applicants at the Commission, when they are required to get a PSD permit, apply to EPA after they have obtained their state permit because it is EPA's preference that state and local permits be issued first. (12/12/2011 RT pp. 190-191.) In fact, EPA will typically wait until state permitting is finished before issuing its PSD. (*Ibid.*) Staff testified that the application of the State's NSR requirements, supplemented by any further mitigation required by the Commission, are so stringent that attainment of a subsequent PSD permit does not normally require any changes to a project or its emissions, or any further mitigation, beyond that required by the State permit. (*Id.*, at pp. 208-209.)

Intervenors contend that the Commission cannot issue a license absent a finding that the project conforms to federal PSD requirements, citing Public Resources Code Section 25523(d)(1), which requires a finding of project conformity with "applicable local, regional, state, and federal standards." They further contend that such a finding of conformity cannot be made until EPA issues such a permit, or at least until the Commission (or perhaps its staff or the air district) performs the PSD analysis that it believes EPA would itself do.

We disagree. EPA will perform its own analysis if a permit is required. The testimony and briefs have explained that the federal PSD process, including its appeals, can take

³ The cited references are to the published decisions of the EPA Environmental Appeals Board (EAB), which rules on challenges to PSD permits issued by delegate state agencies or by the EPA regional administrators.

⁴ The Commission permit is for the federal requirements for New Source Review (NSR) required by the federal Clean Air Act. In California, NSR requirements are part of the State Implementation Plan for all air districts, and are thus issued as state law requirements, unlike the PSD requirements discussed here.

years to complete, and that EPA would prefer to see all state permits issued prior to completing its process. Moreover, the testimony is that projects licensed by the Commission have not been altered in any significant way by the subsequently issued federal PSD permit, either with regard to emissions levels or mitigation, and this has continued to hold true for the GHG PSD permit EPA recently issued for the Palmdale project. (12/12/11 RT 208-209, 218, Ex. 199N.) Staff testified that CECP would meet federal BACT requirements for PSD. (Ex. 230 [Walters, p.3] 12/8/11 RT 192.)

In light of the testimony referenced above, we believe that CECP will comply with federal PSD requirements, for two reasons. First, all the evidence persuasively indicates that CECP will have no difficulty complying with PSD requirements. Second, because the PSD permit is a pre-construction permit, CECP must comply with such requirements or it cannot be constructed. In other words, CECP will comply with federal law because it must comply with federal law.

Intervener Rob Simpson, in a comment on the RPMPD, points out that the SDAPCD is in the process of obtaining ~~delegated authority from EPA to issue PSD permits~~ **approval of the incorporation of PSD standards into the San Diego portion of the State Implementation Plan (SIP)**. He believes that would make the PSD permit a State permit and asks what effect that would have on our determination.

~~In our view, whether issued by a local air district under delegated powers or by the EPA, a PSD permit remains a federal permit. The source of the requirement and standards for issuance of the permit remain federal. If incorporated into the SIP, the PSD permit would become a state permit. As the SDAPCD's recent amendment of its rules is only the first step in the process of SIP incorporation, subject to further state and federal approvals, the PSD permit is currently a federal permit, issued by US EPA and outside of our jurisdiction. We decline to wait for that new rulemaking process to conclude. Whether the PSD process results in a State or federal permit~~ has no effect on our determination that the PSD permit is unlikely to change **the design of the project or the conditions we have already imposed upon it. Further, our newly added condition AQ-SC11 assures that construction will not commence until the PSD permit is approved or found unnecessary.**

3. **Air Quality, in the “Response to Party Arguments and Public Comments” section proposed in the RPMPD Revisions for insertion on RPMPD p. 6.2-26, before the Findings of Fact, revise the second paragraph of the insert as follows:**

Believing the annual PM_{2.5} data in Air Quality Table 9 to show a new violation, Mr. Simpson then asks why the following paragraph “denies the violation.” That following paragraph does not refer **to Air Quality 9's tabulation of normal gas turbine operating impacts, however.** It instead summarizes the results of FSA Air Quality Tables 23 – 25 and related text regarding simultaneous startup and shutdown of the two units, fumigation conditions, initial commissioning of the turbine units, and chemical reaction of plant emissions in the atmosphere. (Ex. 222, p. 4.1-37 – 4.1-41.)

SOCIOECONOMICS

4. Socioeconomics, p. 8.3-6, revise Conclusion of Law 2 as follows:

2. ~~Because no~~ **No** significant ~~adverse socioeconomic impacts will occur as a result of construction and operation of the CECP, no Conditions of Certification are required for this topic.~~

Dated: May 30, 2012, at Sacramento, California.

Original Signed By:

KAREN DOUGLAS
Commissioner
Carlsbad AFC Committee



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**Docket No. 07-AFC-06
PROOF OF SERVICE
(Revised 3/27/2012)**

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DECLARATION OF SERVICE

I, Jacqueline Clay, declare that on May 31, 2012, I served and filed a copy of the attached ERRATA TO REVISED PRESIDING MEMBER'S PROPOSED DECISION. This document is accompanied by the most recent Proof of Service list, located on the web page for this project at: <http://www.energy.ca.gov/sitingcases/carlsbad/index.html>.

The document has been sent to the other parties in this proceeding (as shown on the Proof of Service list) and to the Commission's Docket Unit or Chief Counsel, as appropriate, in the following manner:

(Check all that Apply)

For service to all other parties:

- X Served electronically to all e-mail addresses on the Proof of Service list;
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For filing with the Docket Unit at the Energy Commission:

- X by sending one electronic copy, to the address below (preferred method); ***OR***
- by depositing an original and 12 paper copies in the mail with the U.S. Postal Service with first class postage thereon fully prepaid, as follows:

CALIFORNIA ENERGY COMMISSION – DOCKET UNIT
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OR, if filing a Petition for Reconsideration of Decision or Order pursuant to Title 20, § 1720:

- Served by delivering on this date one electronic copy by e-mail, and an original paper copy to the Chief Counsel at the following address, either personally, or for mailing with the U.S. Postal Service with first class postage thereon fully prepaid:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, that I am employed in the county where this mailing occurred, and that I am over the age of 18 years and not a party to the proceeding.

Original Signed By:

Jacqueline Clay
Hearing Adviser's Office